78-1390

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

ALLEN CLAIBORNE, *et al.*,
Respondents,

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS, AND BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MEMORANDUM FOR THE RESPONDENT UNIONS IN OPPOSITION

Of Counsel:

MULHOLLAND, HICKEY, LYMAN, McCORMICK, FISHER & HICKEY
741 National Bank Building
Toledo, Ohio 43604

HESS & WASHOFSKY
1411 Decatur Street
New Orleans, Louisiana 70116

DONALD W. FISHER
741 National Bank Building
Toledo, Ohio 43604

VICTOR H. HESS, JR.
1411 Decatur Street
New Orleans, Louisiana 70116

Attorneys for Respondent Unions

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

In the Supreme Court of the United States

OCTOBER TERM, 1978

No.

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

v.

ALLEN CLAIBORNE, *et al.*,
Respondents,

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, HELPERS, ROUNDHOUSE AND RAILWAY SHOP LABORERS, AND BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MEMORANDUM FOR THE RESPONDENT UNIONS IN OPPOSITION

Defendant Unions[1] are interested only in the second question set out in Defendant Railroad's[2] Petition which

[1] Defendant Unions consist of International Brotherhood of Firemen and Oilers, Helpers, Roundhouse and Railway Shop Laborers, and Brotherhood of Railway Carmen of the United States and Canada.

[2] Defendant Railroad is Illinois Central Railroad Company.

deals with the right of the Railroad on appeal to challenge the portion of the trial court's judgment exonerating the Railroad's co-defendants, the Unions, from liability to Plaintiffs on claims for breach of the duty of fair representation and for violation of Title VII of the Civil Rights Act of 1964.

Although the Plaintiffs appealed from certain parts of the judgment, *they elected not to challenge the trial court's dismissal of the damage claims against the Unions.* The Railroad appealed this part of the judgment, however, as well as other parts that definitely were adverse to it and in which it had an undoubted appealable interest. The Court of Appeals held that the Railroad had no right or standing on appeal to challenge the trial court's decision exonerating the Unions from liability to the Plaintiffs.

REASONS FOR DENYING THE PETITION

The question of the Railroad's right to appeal the issue of the Union's liability to Plaintiffs does not warrant review by this Court. It does not involve a conflict of decisions between two or more federal courts of appeal or between a state or federal court and this honorable Court. Nor is the issue one that could be characterized as an important question of federal law which has not, but should be, settled by this Court. The issue as decided by the Court of Appeals below comports with settled decisions of this Court as well as other Courts of Appeal, and is an affirmation of the principle that a judgment may be appealed only by a party aggrieved by it.

1. The Railroad had no appealable interest in the portion of the judgment exonerating the codefendant Unions from liability

Plaintiffs did not predicate their several claims of racial discrimination against the Railroad and the Unions on a theory of conspiracy or joint liability. To the contrary,

the claims stated against the Railroad and the Unions, respectively, were based on facts and courses of conduct that were different from and independent of one another.[3] The claims against the Railroad alleged that the Railroad pursued a racially discriminatory policy at Mays Yard in New Orleans, Louisiana, pursuant to which it denied promotions to blacks; provided them with interior training compared with whites; maintained separate job categories which excluded blacks; denied blacks opportunitions for promotions; paid blacks lower wages than whites for the same work; refused to follow seniority ratings to discriminate against blacks in promotions, etc. The claims against the Unions, on the other hand, consisted of charges that the Unions discriminated against blacks by permitting the maintenance of racially separated lodges; denied blacks representation on the Joint Protective Board, an intermediate union federation; denied equal representation to and inadequately represented black members of the craft; and were passive or apathetic in the discharge of their duty to provide fair representation.

The trial court after holding that the Unions did not violate their duty to provide fair representation to Plaintiffs or violate the provisions of Title VII of the Civil Rights Act exonerated them from liability on those damage claims. Its decision as to the Unions' liability was based upon an evaluation of the testimony of numerous witnesses called by the parties and a massive amount of documentary material introduced into evidence. The trial court at the same time held on the basis of extensive testimonial and documentary evidence that the Railroad was liable in damages to Plaintiffs because it engaged in illegal, racially discriminatory activities at Mays Yard.

The controlling principle as to what issues a party may appeal is long standing and well recognized. It has been stated thusly:

---

[3] See the Appendix attached hereto and made a part hereof.

> ". . . Only parties to a decree can appeal. If a party to the suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree . . . ." *Farmers Loan and Trust Company* v. *Waterman*, 106 U.S. 265 (1882).

See also: *Burleson* v. *Coastal Recreation, Inc.*, 572 F.2d 509, 513 (5th Cir. 1978); *Milgram* v. *Loews, Inc.*, 192 F.2d 579, 586 (3rd Cir. 1951); *White & Yarborough* v. *Dailey*, 228 F.2d 836, 837 (5th Cir. 1955); *U.S.* v. *Adamant*, 197 F.2d 1, 5 (9th Cir. 1952), where the Court said:

> ". . . . In order that a judgment be appealable at the behest of a party, the party must be aggrieved by it. . . ."

The Railroad may not, through the medium of an appeal, involve the Unions in Plaintiff's separately stated claims against the Railroad. Similarly, the Railroad has no involvement in the Plaintiff's duty of fair representation and Title VII claims which were stated solely against the Unions and dismissed by the trial court. It is difficult to perceive any theory upon which a contention could be premised to the effect that the Railroad had an appealable interest in the claims asserted by the Plaintiff against the Unions except by resort to the adage "Misery loves company." The Court of Appeals' ruling that the Railroad had no right to appeal from the trial court's dismissal of the Plaintiffs' claims against the Unions was eminently correct.

2. The Railroad had no independent claim against the Unions such as a cross-claim for contribution on which it could appeal

The Railroad, notwithstanding the fact that it failed to file a cross-claim against the Unions seeking contribution, makes the virtually frivolous contention that it has an appealable interest in the trial court's dismissal

of the liability claims against the Unions because it may wish to seek contribution from them. As the Court of Appeals noted, the Railroad obviously cannot appeal on this theory in circumstances where such relief has not been sought. It said:

> ". . . . The trial court's judgment in this respect is, of course, adverse to any right of contribution against the defendant unions held by the railroad. Had the railroad cross-claimed for contribution below, it would be proper for us to review the court's judgment insofar as it adversely affects the railroad's interests. However, it is elementary that we ordinarily may not review issues presented for the first time on appeal; this rule applies *a fortiori* to claims never presented to the trial court . . . ." (A-23).

The portion of the decision referred to above is so plainly correct that further review by this Court would be unwarranted.

CONCLUSION

For the reasons given, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Of Counsel:

MULHOLLAND, HICKEY, LYMAN, McCORMICK, FISHER & HICKEY
741 National Bank Building
Toledo, Ohio 43604
(419) 243-6251

HESS & WASHOFSKY
1411 Decatur Street
New Orleans, Louisiana 70116
(504) 949-2742

DONALD W. FISHER
741 National Bank Building
Toledo, Ohio 43604

VICTOR H. HESS, JR.
1411 Decatur Street
New Orleans, Louisiana 70116

Attorneys for Respondent Unions

APPENDIX

APPENDIX

Article VIII and IX of Plaintiffs' Complaint read as follows:

"VIII.

"NATURE OF CLAIM

"Defendant, ICRR, has through custom, practice or otherwise, developed a policy which results in job and racial discrimination against all Negro employees of both unions:

"(1) refusing to promote Negro employees because of their race;

"(2) providing better training for its white employees;

"(3) maintaining separate job categories which have excluded Negro employees;

"(4) denying Negro employees the opportunity to advance to higher paying jobs because of their race;

"(5) paying Negro employees lower wages for performing the same work as white employees;

"(6) refusing to allocate severance pay to Negro employees whose jobs have been abolished and refusing to reemploy these Negro employees according to their seniority in violation of an ICRR and Union Agreement;

"(7) generally discriminating against the plaintiffs and their respective class solely because of their race;

"(8) refusing to observe seniority ratings while discriminately promoting newer employees; and

"(9) failing to provide the sixty-day notice as stipulated in the then effective mediation agreement.

"Each defendant Union likewise has discriminated against its members due to their race by:

"(1) permitting the maintenance of two identical local unions whose membership is based on race only;

"(2) refusing Negroes representation on the Joint Protective Board of the ICRR;

"(3) denying equal representation to Negro members of the Union; and

"(4) intentionally and wilfully representing Negro unions inadequately, specifically Local Union 220 of Brotherhood of Railway Carmen of the U.S. and Canada.

"As a result of the above stated policies pursued by defendants, plaintiffs and members of the class which they represent have been and will continue to be deprived of equal employment opportunities all in direct violation of the Civil Rights Act of 1964 with special reference to Title VII.

"IX.

"DISCRIMINATION PRACTICES

"Plaintiffs, Allen Claiborne, et al., were hired by defendant, ICRR, as laborers and were eventually advanced to carmen helpers. Notwithstanding the fact that Mr. Claiborne performed many of the duties of a carmen, another craft, he continued to be classified and compensated on the lower basis as a carmen's helper. Although defendant railroad has requested the plaintiffs to train novice white employees to new vacancies, ICRR has refused to promote Mr.

Claiborne and others to any of these superior employment openings, despite the fact that plaintiffs have over two decades of experience with defendant employer and further plaintiffs and several others have passed objective, written tests to qualify them for promotion and furthermore, under the guise of an efficiency measure said ICRR has completely abolished the positions or class of carman's helper, a predominantly Negro occupation at the New Orleans Mays Yard Branch of the railroad and has refused to provide separation pay or new employment to them and the aggrieved class represented as is customary with all employees and in further violation of the ICRR Agreement of the Union. When several of these Negro ex-carmen helpers were subsequently re-hired as a disguise to re-establish the crafts in an effort to avoid paying separation pay to said wrongfully discharged employees and they were required to work at 'helper's' pay and status even though this position had been previously abolished by the ICRR and the re-hired employees were doing the same work done by white carmen and carmen apprentices.

"Defendants have been passive, if not apathetic, in their duty to protect the interests of its Negro members. The unions have supported racial inequality through its unjustifiable acceptance of racially segregated local unions as well as its failure to actively pursue discrimination claims continuously filed by Negro union members. In addition, said Unions have failed to properly represent said plaintiffs in this particular cause of action.

"The total effect of the discriminatory policies practiced by the defendants against Negro employees have deprived Negro workers of the same employment opportunities as their white counterparts and have otherwise adversely affected their status as employees because of their race and color."